

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-6103

To be Argued by:
JAMES NESPOLE

United States Court of Appeals
For the Second Circuit

Docket No. 77-6103

W. J. USERY, JR., Secretary of Labor, U.S. Dept. of Labor,
Plaintiff-Appellee,

v.

NORTHWEST ORIENT AIRLINES, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLANT
NORTHWEST AIRLINES, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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W. J. USERY, JR., Secretary of : DOCKET NO. 77-6103
Labor, United States Department :
of Labor, :

Plaintiff-Appellee, :

-against- :

NORTHWEST ORIENT AIRLINES, INC., :

Defendant-Appellant :

-----x

BRIEF ON BEHALF OF DEFENDANT-APPELLANT
NORTHWEST AIRLINES, INC.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Is the Federal Aviation Administration ("FAA"), rather than the Occupational Safety and Health Administration ("OSHA"), the agency authorized by Congress to regulate the safe working conditions of the employees of Northwest Airlines, Inc. ("Northwest")?

The District Court did not address the issue, and required that Northwest exhaust its purported administrative

remedies with respect to that issue (A 128).*

2. May a warrantless search of Northwest's premises be conducted by OSHA officials?

The District Court below stated that a warrant need not be obtained prior to such a search (A 131).

3. If a warrantless search of Northwest's premises may not be conducted by OSHA officials, is the District Court empowered to issue a search warrant?

In reinstating the inspection warrant, the District Court necessarily held that it was empowered to issue a warrant.

4. Was the warrant properly reinstated?

The warrant was improperly reinstated by reason of the failure of the District Court to examine the authority of OSHA officials to conduct a search.

5. Must Northwest exhaust its purported administrative remedies with respect to its claim that the FAA, and not OSHA, may inspect Northwest's premises?

The District Court held that Northwest must exhaust its purported administrative remedies (A 128).

* References to the Joint Appendix are designated (A), with the appropriate pagination of the Joint Appendix inserted within the parentheses.

Preliminary Statement

This brief is submitted on behalf of defendant-appellant Northwest. This appeal is from decisions and orders dated June 10, 1977 (A 123), and July 5, 1977 (A 143) of United States District Judge Edward R. Neaher of the United States District Court for the Eastern District of New York.

At issue upon the instant appeal is whether the District Court should preclude OSHA from attempting to impose a regulatory scheme upon Northwest, which is already regulated by the FAA, in order to avoid the confusing and often dangerous effects which may result from duplicating and overlapping regulation. In addition, at issue is whether Northwest should be permitted to suffer a violation of its Fourth Amendment rights which, once suffered, cannot be remedied.

As will be demonstrated below, the FAA, and not OSHA, is the agency charged with the regulation of the safe working conditions of Northwest's employees. As a result, decisions of the United States Supreme Court establish that, under the circumstances presented herein, a warrantless administrative search of Northwest's premises by OSHA officials is proscribed by the Fourth Amendment. In addition, even if OSHA regulated the safe working conditions of Northwest's employees, it has been held that the Occupational Safety &

Health Administration Act of 1970 (the "Act") does not authorize a District Court to issue an inspection warrant to OSHA officials to conduct such a search.

Moreover, assuming arguendo that in proper circumstances the District Court is empowered to issue a warrant to OSHA officials to conduct an inspection of Northwest's premises, it is Northwest's position that the District Court erred by failing to examine and find, prior to the issuance of a warrant, that the FAA either had not been authorized by Congress, or did not exercise its authority, to regulate the safe working conditions of Northwest's employees. As noted above, Northwest will show that such an examination by the District Court, if conducted, would support a finding that the FAA is authorized by statute to regulate the safe working conditions of Northwest's employees and exercises its authority to do so. Accordingly, the warrant was improperly reinstated, and its issuance will result in a violation of Northwest's rights which cannot be remedied.

In addition, the District Court erred in requiring Northwest to exhaust its purported administrative remedies by reason of: (a) the absence of a meaningful administrative remedy; (b) the fact that Northwest presented a compelling Fourth Amendment issue to the District Court; and (c) a jurisdictional dispute exists between the FAA and OSHA concerning the regulation of the working conditions of Northwest's employees.

STATEMENT OF FACTS

Northwest is an air carrier which holds certificates of public convenience and necessity issued by the Civil Aeronautics Board, pursuant to the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq.), to provide air transportation services within the United States, and between the United States and various points of Asia (A 76). As an air carrier, Northwest is subject to stringent federal regulation by the FAA, which is charged, pursuant to the Federal Aviation Act, with governing all aspects of aviation safety. Among the persons and employees sought to be protected by the provisions of the Federal Aviation Act are pilots, flight engineers, attendants, passengers, ground mechanics, repairmen, and those residents of localities in and about the flight paths and housing facilities of Northwest's aircraft.

In connection with the regulatory scheme imposed by the Federal Aviation Act, the FAA has assigned fourteen (14) full-time inspectors to monitor Northwest's operations (A 62). These FAA inspectors, who are on Northwest's premises almost daily, monitor not only flight operations, but also work performed both in and around Northwest's aircraft and hangars (A 62).

In addition, at John F. Kennedy International Airport, Queens, New York, the FAA maintains a staff of twenty (20) full-time inspectors who are concerned with the manner in which maintenance is performed at all U.S. airlines. Should these inspectors desire immediate information and/or inspections of Northwest's facilities at JFK, they make unannounced visits to the premises, and at various times they may be on Northwest's premises without the knowledge of Northwest's intermediate management personnel (A 63).

Pursuant to its statutory authority, the FAA, after review, has approved extensive rules and regulations which have been submitted by Northwest, in accordance with statutory requirements, concerning the use of Northwest's aircraft and equipment utilized in connection with the providing of air services by Northwest. These rules and regulations are contained in manuals for all aircraft types operated by Northwest, and the maintenance manuals alone, which are contained in cassettes of microfilm, are over 6,000 pages in length when reproduced (A 64). These maintenance manuals are approved by the FAA when first prepared and each revision is additionally submitted to, and approved by, the FAA (A 64). These detailed manuals, which regulate

every aspect of the aircraft and equipment utilized by Northwest, include accident preventive measures and remedial safety procedures (A 64). In furtherance of the regulatory scheme set forth in the Federal Aviation Act, a substantial number of Northwest's maintenance personnel are licensed by the FAA, but only after they have received extensive training in the proper utilization of the maintenance equipment and procedures, and have passed extensive FAA examinations (A 67).

Notwithstanding the broad FAA authority to regulate the safety standards relating to Northwest's employees, a prior administrative proceeding which bears upon the issues in this case was commenced by the Secretary of Labor (the "Secretary"), plaintiff-appellee herein, against Northwest for an alleged violation of the Act. On May 21, 1975 the Secretary notified Northwest that OSHA proposed to assess a penalty against Northwest for a violation of § 5(a)(1) of the Act because an inspection of one of Northwest's maintenance facilities at JFK airport allegedly revealed that adequate means were not provided to protect its ground maintenance employees from the hazards purportedly attendant to the performance of maintenance operations on the flaps of the Boeing 747 aircraft (A 70).

Northwest contested the alleged violation at the administrative proceeding instituted before the Occupational

Safety and Health Review Commission (the "Commission"), which was presided over by Administrative Law Judge Jerome C. Ditore. Upon the opening of the hearings, Northwest moved to dismiss the proceeding upon the ground that it was exempt from the Act (A 77). That motion was reserved, and the matter thereupon proceeded to trial upon the merits in a proceeding which consumed twenty-four (24) days of hearings, during which testimony as to the purported violation, the FAA regulations, and Northwest's rules and regulations set forth in the manuals was adduced.

During the hearings Judge Ditore directed a seventy (70) day recess wherein the Secretary was to contact the Department of Transportation, which includes the FAA, in an effort to resolve the jurisdictional dispute between OSHA and the FAA concerning the regulation of the safe working conditions of Northwest's employees. However, the Secretary did not comply with this request, and the trial continued (A 71). On September 28, 1976 Judge Ditore rendered a decision sustaining Northwest's position as to jurisdiction, and dismissed the Secretary's complaint upon the ground that it was the FAA, and not OSHA, which regulated the safe working conditions of Northwest's employees (A 36).

In fact, during the trial the Secretary's own expert witness

"stated with absolute certainty that the circuit breaker lock-out safety procedure required by [Northwest], as well as other safety procedures required by other airlines, when changing landing lights on a 747 aircraft, without an access panel, eliminate any occupational hazard to a maintenance employee working in the leading edge flap cavity" (A 45).

On October 26, 1976 the Secretary served his petition for review of Judge Ditore's decision and order (A 359). On October 28, 1976 Commissioner Cleary filed an order requiring review before the full Commission of the administrative law judge's determination (A 360). To date, approximately fourteen (14) months after Judge Ditore's determination had been reached, no decision upon the appeal, Usery v. Northwest Airlines, Inc., Docket No. 13649, has been issued by the Commission, which, upon the granting of a motion made by the Secretary, and over the opposition of Northwest, has refused to act by reason of a vacancy in the three-member Commission.

Notwithstanding Judge Ditore's decision, on October 27, 1976 an OSHA representative requested permission of Northwest officials to inspect Northwest's premises at Hangar No. 1, JFK airport, for violations of the Act (A 18). In view of the decision of Judge Ditore that Northwest was exempt from complying with the provisions of the Act, Northwest refused entry to the OSHA official.

On November 4, 1976, the Secretary made an ex parte application to United States Magistrate Vincent

Catoggio for a warrant to inspect Hangar No.1. An inspection warrant was issued by Magistrate Catoggio upon that date, and on the next day, November 5, 1976, an OSHA official again appeared at Hangar No.1 to conduct an inspection. Counsel for Northwest immediately notified the Secretary that Northwest would seek to vacate the warrant, and representatives for Northwest and the Secretary appeared before Magistrate Catoggio on that date to present arguments upon Northwest's application to vacate the warrant.

Northwest's application before the Magistrate was predicated upon the ground that, pursuant to Section 4(b)(1) of the Act, 29 U.S.C. §653(b)(1), OSHA was preempted by the FAA with respect to regulation of the safe working conditions of Northwest's ground maintenance employees, and that the Magistrate should not have issued the warrant.

In view of the decision of Administrative Judge Ditore, which he had previously not been aware of, Magistrate Catoggio granted Northwest's application, and vacated the inspection warrant with these words:

"Search Warrant

vacated - in view of FAA preempting part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore Sept. 28, 1976.

Vincent A. Catoggio." (A 58)

On December 1, 1976, or nearly one month after the warrant had been vacated, the Secretary moved before the United States District Court, Eastern District of New York, for an order: (1) directing the Magistrate to reinstate the inspection warrant; or (2) compelling Northwest to submit to an inspection of its premises by OSHA representatives. In a decision and order dated June 10, 1977 (A 123), Judge Edward R. Neaher granted the Secretary's motion, and directed the Magistrate to reinstate the inspection warrant relating to Northwest's Hangar No.1. In granting the Secretary's application, Judge Neaher held that Northwest must exhaust its purported administrative remedies before the Commission in attempting to challenge OSHA's authority to inspect its premises (A 128). In addition, Judge Neaher held that Judge Ditore's decision was not entitled to res judicata effect with respect to the authority, or lack thereof, of OSHA to regulate the safe working conditions of Northwest's employees (A 131). Finally, Judge Neaher held that the application for a warrant was founded upon probable cause by reason of its recitation that Northwest had previously been cited by OSHA for violations of the Act (A 131), and that, in any event, a warrant need not be obtained by OSHA officials to conduct a search of Northwest's premises (A 131).

Northwest served and filed a notice of appeal from Judge Neaheer's decision and order (A 133), and moved before the District Court for an order: (a) granting Northwest leave to reargue the Secretary's motion, and upon reargument and reconsideration, vacating the Court's decision and order; and (b) staying the operation of the order dated June 10, 1977 pending: (i) the hearing and determination of the motion before the Court; and (ii) the determination of the instant appeal (A 135). In a decision and order dated July 5, 1977 (A 143), Judge Neaheer adhered to his original decision (A 131), but stayed the operation of the Court's earlier order, upon the consent of the Secretary, pending the determination of the present appeal (A 144). On July 13, 1977, Northwest served and filed a notice of appeal to this Court from that part of the order dated July 5, 1977 denying Northwest's motion for reargument and reconsideration (A 145). In an order of this Court dated September 13, 1977, the separate appeals from the District Court's orders were consolidated for briefing and argument before this Court under Docket No. 77-6103 (A 147).

The attempt to inspect Hangar No. 1 was not an isolated effort by the Secretary to inspect Northwest's premises. On or about November 9, 1976, the Secretary filed

a summons and complaint in the United States District Court for the Southern District of Florida, Docket No. 76-1983 Civ. JLK, in which the Secretary requested an order directing Northwest to permit OSHA officials to inspect Northwest's facilities at Miami International Airport, Miami, Florida. However, in a decision and order dated January 14, 1977, the District Court denied the Secretary's application, and dismissed the complaint. The Secretary thereafter appealed that decision to the United States Court of Appeals for the Fifth Circuit sub. nom. Marshall v. Northwest Airlines, Inc., et.al., Docket No. 77-1546, where, in a belatedly submitted "Brief for The Secretary of Labor," p. 13, the Secretary stated that he "can only assume that the District Court [below had] agreed with both grounds asserted by Northwest and held that the Fourth Amendment barred the inspection in this case and that Section 4(b)(1) of the Act exempted Northwest from inspection or citation for violations." By reason of the Secretary's failure to prosecute his appeal, on November 7, 1977 the appeal was dismissed by the Court. The Secretary thereafter moved for vacatur of the Fifth Circuit's order dismissing the appeal, and that motion is presently pending before the Court.

In addition, in an effort to conduct an inspection of Northwest's facility at 5300 South Howell Avenue, Milwaukee,

Wisconsin, on March 3, 1977 the Secretary filed an "Application for Inspection Warrant Under the Occupational Safety and Health Administration Act of 1970" in the United States District Court for the Eastern District of Wisconsin, Misc. Case No. 594. In a decision and order dated September 9, 1977, the District Court denied the Secretary's application for an inspection warrant (In Re Establishment Inspection of Northwest Airlines, Inc., 5 BNA OSHC 1848 (E.D. Wis. 1977)). The Secretary has recently appealed from that order to the United States Court of Appeals for the Seventh Circuit, where an appeal is presently pending.

While the application of the Secretary in the instant action was sub judice before the District Court, a three-judge panel of the United States District Court for the District of Idaho held that the Act's inspection provisions were violative of the Fourth Amendment in that they did not authorize warrantless inspections, and that such provisions did not empower the District Court to issue an inspection warrant based upon probable cause. Barlow's, Inc. v. Marshall, 424 F. Supp. 437 (D. Idaho 1976). That decision and order have been appealed to the United States Supreme Court, and will be argued during this Term. On February 3, 1977 Mr. Justice Rehnquist stayed the District Court's order "except as it applies to appellee Barlow's, Inc."

By reason of the pending appeals before: (1) the Supreme Court in Barlow's, Inc. v. Marshall, supra; (2) the Fifth Circuit in Marshall v. Northwest Airlines, Inc., supra; (3) the Commission in Usery v. Northwest Airlines, Inc., supra, the issues in which bear upon those presented upon this appeal, on July 29, 1977 Northwest moved for an order of this Court staying the filing of its brief and appendix, and the hearing of the instant appeal, pending the determination of those proceedings. Aware that those appeals might not be determined forthwith, Northwest alternatively requested this Court to extend the time for filing its brief and the joint appendix up to, and including, December 1, 1977. In a Civil Appeal Scheduling Order, dated August 5, 1977, the Clerk of the Court granted Northwest's motion in part, and ordered that this brief and the joint appendix be filed on or before December 1, 1977.

ARGUMENT

POINT I

THE ACT HAS NO APPLICATION TO THE WORKING CONDITIONS OF NORTHWEST'S EMPLOYEES BECAUSE THE FEDERAL AVIATION ADMINISTRATION, PURSUANT TO STATUTORY ENACTMENT, POSSESSES AND EXERCISES THE AUTHORITY TO REGULATE THOSE CONDITIONS

Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), provides:

"Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

There is no issue concerning the statutory authority of the FAA to prescribe regulations affecting the occupational safety and health of Northwest's employees.

In American Airlines, Inc., 3 BNA OSHC 1624 (OSHRC Nov. 6, 1975), respondent American Airlines, Inc. was cited for allegedly not complying with certain standards promulgated by OSHA relating to the working conditions of those individuals employed at its cargo facility at La Guardia Airport, Queens, New York. American Airlines urged that the citations should be vacated, pursuant to Section 4(b)(1) of the Act, since the FAA regulated those working conditions.

Significantly, in a concurring opinion upholding the respondent's claim, Commissioner Moran stated that the Secretary "correctly concedes that the Federal Aviation Agency has statutory authority to prescribe regulations affecting occupational safety and health of airline employees" (3 BNA OSHC at 1626).

A review of the facts will show that the FAA has exercised its authority to prescribe such regulations, and it was so found by Administrative Judge Ditore in his decision dated September 28, 1976 after review of testimony and evidence adduced during the course of a trial which lasted twenty-four (24) days. We shall refer to those findings in greater detail.

The importance of the fact that the safe working conditions of Northwest's employees are regulated by the FAA may not be overstated. Northwest has not challenged the Secretary's purported jurisdiction over its operations in an attempt to obstruct the goal of promoting the safety of its employees. Indeed, it is precisely because Northwest is overwhelmingly concerned with safety that the Secretary's application was opposed. Northwest is fully regulated and inspected by the FAA, and the undesirability of having two agencies regulate safety in the airline industry, and two

sets of inspectors doing the same job, is self-evident. The responsibility of the agency concerned should not be diluted, and Northwest should not be subjected to the confusion dual regulation will foster. Northwest should not have to make a choice whether those safety procedures which it employs, and which have been approved by the FAA, comply with OSHA regulations, if they exist. Nor should Northwest be required to decide whether it must comply with OSHA regulations, rather than FAA regulations, in the event of a conflict between the regulatory schemes. Congress recognized this in enacting Section 4(b)(1), and the Commission is cognizant of that fact. Mushroom Transportation Company, Inc., 1 BNA OSHC 1390 (OSAHRC Docket No. 1588, Nov. 7, 1973).

The language of Section 4(b)(1) completely excludes OSHA regulation where another agency exercises statutory authority, and was intended to eliminate entirely conflicts created by division of responsibility and the confusion which may result from regulation of the same subject matter by two agencies. This is of particular pertinence in airline regulation because of the inherent dangers requiring the greatest care in the interest of safety of those individuals

sought to be protected by the Federal Aviation Act. This has been specifically recognized even as to noise pollution. As the Supreme Court stated, in the case of City of Burbank v. Lockheed, 411 U.S. 624, 638-39 (1973):

"The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. §1348(a), and the protection of persons on the ground. 49 U.S.C. §1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." 49 U.S.C. §1431(d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." (Emphasis added).

In Burbank the Court noted dual federal jurisdiction to control noise pollution between Environmental Protection Agency ("EPA") and the FAA. It should be noted, however, that the Noise Control Act of 1972 amended §611 of the Federal Aviation Act, 49 U.S.C. § 1431, to provide for joint consultation between the FAA and EPA in matters relating to noise control. In contrast, Section 4(b)(1) of the Act provides for exclusive, rather than overlapping, authority of Federal agencies in matters relating to the regulation of safe working conditions. It should be noted that Congress

has specifically provided guidelines with respect to those instances where the FAA would coordinate its responsibilities with another agency. See 49 U.S.C. §§ 1461-1463.*

No guidelines exist with respect to coordination by the FAA with OSHA, or any other agency, concerning the responsibility of regulating the safe working conditions of airline employees, for the need to limit regulation of airlines to a single agency has been recognized from the beginning. As the first administrator of the FAA stated:

"It is essential that one agency of government and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation." H.R. Rep. No. 2360, 85th Cong., 2d Sess. 22 (1958). (emphasis supplied)

An examination of the Federal Aviation Act of 1958 shows that Congress has given to the FAA the broadest

* It should be noted that during the trial before Judge Ditore the Secretary did not afford himself of the opportunity to contact the Department of Transportation to resolve the jurisdictional dispute between the two agencies (A 71).

authority, and has imposed upon it the duty to govern all aspects of the regulation of air carriers.

Thus, the Federal Aviation Administrator is required to prescribe and review:

"....

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in which such inspection, servicing and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

.

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of air-men, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce." (49 U.S.C. § 1421.)

Mechanics and repairmen, such as those employees who work within Hangar No. 1, are classified as "airmen"

under the Federal Aviation Act. 49 U.S.C. § 1301(7).

The Federal Aviation Act additionally imposes a requirement upon air carriers, such as Northwest, to conduct inspections, maintenance, overhaul and repair of all equipment in accordance with rules and regulations promulgated by the Administrator, and requires ground maintenance personnel to comply with those orders, rules and regulations of the Administrator relating to aviation maintenance. Thus, 49 U.S.C. § 1425(a) provides:

"It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul, and repair of all equipment used in air transportation as may be required by this chapter, or the orders, rules, and regulations of the Administrator issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply with the requirements of this chapter relating thereto, and the orders, rules, and regulations issued thereunder."

Deviation from the statutory mandates by the maintenance personnel can result in civil or criminal penalties (49 U.S.C. §§ 1471, 1472).

Pursuant to its statutory mandate, the FAA has promulgated extensive regulations which are contained in Volume 14 of the Code of Federal Regulations, and which are

known as the Federal Aviation Regulations ("FAR"). Part 43 of FAR, which covers maintenance and preventive maintenance, provides:

"(a) Each person maintaining or altering, or performing preventive maintenance shall use methods, techniques and practices acceptable to the Administrator. He shall use the tools, equipment and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturers involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality that the condition of the aircraft, airframe, aircraft engine, propeller or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

(c) Special provisions for air carriers and commercial operators. Unless otherwise modified by the Administrator, the methods, techniques and practices contained in the maintenance manual or the maintenance part of the air carrier manual of a certificated air carrier . . . constitute acceptable means of compliance with this section (14 CFR § 43.13).

The FAR further requires each "air carrier . . . to prepare and keep current a manual for the use and guidance of

flight and ground operations personnel in conducting its operations" (14 CFR § 121.133(a)), and requires each manual to contain, among other things:

"(a) 1. instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety.

....

(b) 1. General Policies

....

16. Instructions and procedures for maintenance, preventive maintenance, and servicing.

....

19. Airworthiness inspections, including instructions covering procedures standards, responsibilities, and authority of inspection personnel.

....

24. Other information or instructions relating to safety." (14 CFR §§ 121.135(a), (b)).

See also 14 CFR §§ 121.137(a)(1),(3), which require the manuals to be supplied to the "appropriate ground operations and maintenance personnel," and to "[r]epresentatives of the Administrator assigned to" the air carrier.

In addition, the FAR contains extensive rules pertaining to the loading, handling and transportation of cargo, which is a portion of that activity conducted within Hangar No. 1 (A 66). (See, e.g., 14 CFR § 121.135(b)(23)(i)). See also American Airlines, Inc., 3 BNA OSHC 1624 (OSHRC Nov. 6, 1975).

Pursuant to the foregoing requirements, Northwest has prepared and maintains maintenance manuals which cover every aspect of the maintenance of its equipment and aircraft and safety procedures in connection therewith (A 64). Those manuals are approved by the FAA when they are first prepared, and are continually updated to reflect the experiences of the air transportation industry (A 64). The manuals are readily accessible at all locations where Northwest personnel perform maintenance or cargo handling or storage.

With respect to cargo handling, the manuals cover, among other things, ramp safety procedures (A 290), load control (A 293), operational control (A 296), preparation of weight distribution (A 315), transportation of animals and perishable materials (A 303), weight and balance training (A 315), acceptable and non-acceptable shipments, including descriptions as to handling dangerous cargo (A 317), and cargo loading precautions (A 343).

In fact, a substantial number of Northwest's personnel are licensed by the FAA, but only after they have received extensive training in proper maintenance procedures and the use of maintenance equipment (A 67). Those ground maintenance personnel who possess an airframe license may only obtain one after passing a written and practical test (A 67, 88). These licensees repair the structure of the aircraft or its internal systems, and utilize equipment, consisting of specialized tools, which is stored within the maintenance hangar (A 68).

Other maintenance personnel possess powerplant (aircraft engine) licenses which are also obtained after an extensive FAA examination. These individuals work on the engines and use parts, tools and equipment comparable to those utilized by airframe licensees (A 68). Apart from those radio electrical mechanics who work within the hangar, and who follow detailed procedures set forth in the manuals (A 69), the remainder of the personnel working in the hangar consist of plant maintenance mechanics who perform maintenance and repair work on numerous tools and other equipment which are found in the maintenance hangars (A 69).

The FAA has not only prescribed regulations for the safe working conditions of Northwest's employees, but it has implemented them. As indicated in pages 5 and 6, supra,

the FAA has a complete complement of inspectors who insure that the prescribed procedures are complied with.

The exercise of the authority of the FAA to regulate the occupational safety and health of the ground maintenance employees of air carriers has been recognized by the Commission.

Administrative Law Judge Ditore's decision, dated September 28, 1976 (A 36), was the product of a trial which lasted twenty-four (24) days, wherein substantial testimony and evidence was introduced as to the extensive FAA regulation of Northwest's ground maintenance personnel (A 79). As a result of hearing and considering such testimony, Judge Ditore held:

"Congress did enact the Federal Aviation Act to induce air safety in air transportation with specific concern for the safety and protection of passengers, aircraft crews and persons on the ground from aircraft mishaps but it does not follow that the broad latitude given the F.A.A. in matters of safety is limited only to safety considerations of the airworthiness of aircraft in flight. The authority conferred on the F.A.A. in matters of safety encompasses and includes not only the work of ground maintenance crews as it relates to the airworthiness of aircraft, but includes the safe working conditions of the ground crews when performing aircraft maintenance work (40 U.S.C. § 1421." (A 47, 48)

Judge Ditore ruled that not only had Congress granted the FAA statutory authority to regulate the safe working conditions of maintenance personnel, but that such authority had been exercised by the FAA:

"The question remains whether the F.A.A. exercised its broad authority under the Federal Aviation Act of 1958 to prescribe regulations for the safe working conditions of aircraft ground maintenance personnel. The Act, the regulations issued pursuant thereto by the F.A.A. and the evidence adduced at the hearing on this issue require an affirmative answer." (A 47).

Specifically, Judge Ditore found, after a review of the Federal Aviation Act, the regulations promulgated thereunder, and the testimony adduced at the trial, that Northwest

"used methods, techniques and practices acceptable to the FAA, maintained the required manuals in printed and microfilm form for its maintenance personnel which contained the instructions and procedures as to the approved methods, techniques and practices necessary not only for changing landing lights on its 747 aircraft not equipped with access panels but for performing this specific maintenance task or work in a safe manner" (A 43).

In arriving at his determination, Judge Ditore stated that the Secretary's expert witness conceded that the safety procedure employed by Northwest "eliminated any

occupational hazard to a maintenance employee" (A 45).

Despite the initiation of the proceeding against Northwest, the Secretary acknowledged, during the course of the proceeding, that the procedure employed by Northwest with respect to changing landing lights on the Boeing 747 airplane was one of two alternative procedures advocated by OSHA to prevent or eliminate any hazard attendant to the task (A 45). This incident clearly illustrates the needless confusion and ill-conceived restrictions to which an airline may be subjected by unnecessary regulation.

The determinations reached by Judge Ditore, and the Commission in American Airlines, Inc., supra, confirm that the FAA regulates the safe working conditions of Northwest's employees, and that the District Court erred in reinstating the inspection warrant relating to Hangar No. 1. It is unimportant that Judge Ditore's decision concerned the flaps of the Boeing 747 aircraft, and that the issue of handling radioactive materials was presented to the Commission in American Airlines, Inc. Those holdings are grounded on findings based upon extensive evidence that the FAA exercises its statutory authority to regulate working conditions of employees. Accordingly, their effect should not be limited "to one set of working conditions..." (A 20), and the decisions of those Courts which have interpreted Section 4(b)(1) permit those decisions to be given broader effect.

In Southern Ry. Co. v. Occupational Saf. & H. Review Comm., 539 F.2d 335 (4th Cir. 1976), the Fourth Circuit was confronted with a situation respecting the railroad industry in which the Secretary argued that the term "working conditions" set forth in Section 4(b)(1) pertained to the "particular, discrete hazards" encountered by an employee (539 F.2d at 339). In rejecting that argument, the Court stated that the term "working conditions" means the "environmental area in which an employee customarily goes about his daily tasks," and that "when an agency has exercised its statutory authority to prescribe standards affecting occupational safety and health for such an area, the authority of the Secretary of Labor in that area is foreclosed" (539 F.2d at 339).

In addition, the Fifth Circuit has held in Southern Pac. Transp. Co. v. Uery, 539 F.2d 386 (5th Cir. 1976), that the term "working conditions" embraces both "surroundings" and "hazards" (539 F.2d at 391). The Court characterized "surroundings" as the "general problem" concerning the use of certain materials by employees, and "hazards" as, among other things, the "location" at which employees work (539 F.2d at 391).

As a result, whether the narrow issue decided by Judge Ditore concerned the leading edge flaps of a

Boeing 747 airplane is unimportant, for the cases reveal that Section 4(b)(1) is to be given the broadest application. The crucial fact is that Judge Ditore's decision involved a finding that the FAA has prescribed and effectuated standards affecting the "environmental area" and "location" in which Northwest's ground maintenance personnel go about their daily tasks. The inspection of Hangar No. 1 by OSHA officials would touch and concern that "environmental area" and "location", and OSHA is therefore preempted by Section 4(b)(1) from acting.

Any other interpretation of Section 4(b)(1) would lend support to the Secretary's "nook and cranny" theory, a theory which has not been accepted by the Courts. See Southern Ry. Co. v. Occupational Saf. & H. Review Commission, 539 F.2d at 338. The unwise nature of such a course is underscored by the facts applicable to the proceeding commenced before Judge Ditore. In attempting to clarify the jurisdictional issue of the FAA's authority, Northwest was engaged in a trial which consumed twenty-four (24) trial days (during which time Judge Ditore unsuccessfully requested OSHA officials to confer with FAA officials to resolve the dispute), where the transcript consisted of 3,904 pages, and the record included over 150 exhibits (A 79). Acceptance of

the Secretary's position may entail proceedings equally burdensome. A proper construction of Section 4(b)(1) requires the conclusion that the "working conditions" of Northwest's employees have been regulated by the FAA. As noted at pages 25-26, Northwest fully presented the scope of the FAA's regulation to the District Court. The District Court gave no consideration to the facts concerning the FAA's regulation, nor did it consider either the determination reached by Judge Ditore or the purpose underlying the enactment of Section 4(b)(1). The District Court erred in reinstating the inspection warrant.

POINT II

A WARRANTLESS SEARCH OF NORTHWEST'S
PREMISES MAY NOT BE CONDUCTED BY
OSHA OFFICIALS

In dictum, the Court below held that it viewed "a warrant as [an] unnecessary" predicate to an inspection of Northwest's premises by OSHA representatives (A 131). However, by seeking a warrant to inspect Northwest's premises in Hangar No. 1, the Secretary has implicitly recognized that a warrantless search of Northwest's premises would be violative of the Fourth Amendment's proscription against unreasonable searches and seizures. Northwest agrees. See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Barlow's, Inc. v. Marshall, 424 F. Supp. 437 (D. Idaho 1976) (Three-Judge Court); Brennan v. Gibson's Products, Inc. of Plano, 407 F.Supp. 154 (E.D. Tex. 1976) (Three-Judge Court); Dunlop v. Hertzler Enterprises, 418 F. Supp. 627 (D.N.M. 1976) (Three-Judge Court); Usery v. Centrif-Air Machinery Co., Inc., 424 F. Supp. 959 (N.D. Ga. 1977); In Re Establishment Inspection of Northwest Airlines, Inc., 5 BNA OSHC 1848 (E.D. Wis. 1977); cf. Marshall v. West Point Peperell, Inc., 5 BNA OSHC 1225 (N.D. Ga. 1977).

While the opinion of the Court below that a warrantless search of Northwest's premises may be conducted by OSHA is not the Court's holding, it is important to address that issue in order to demonstrate that a warrant based upon probable cause may not be issued by the District Court, and that the Court below erred in reinstating the inspection warrant which had been vacated by Magistrate Catoggio. In addition, the Court's opinion underscores its inclination to disregard the undesirable practical effects that may result from concurrent regulation of an air carrier.

The Supreme Court has held that, except in certain situations, administrative searches, like criminal searches, may be conducted only if a judicial warrant is first obtained. In See v. Seattle, 387 U.S. 541, 543, 545 (1967), the Court held that:

"The businessman ... has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property ... administrative entry, without consent, upon the portions of commercial enterprises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."

See also Camara v. Municipal Court, 387 U.S. 523 (1967);

G.M. Leasing Corp. v. United States, ____ U.S. ____, 50

L.ed. 2d 530 (1977). The Court set forth those limited exceptions to the proscription against warrantless administrative searches in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972).

In Colonnade, the owner of a catering establishment refused entry to his premises by an agent of the Alcohol and Tobacco Division of the Internal Revenue Service who sought to inspect the premises for possible violations of the federal excise tax law. Noting that the Secretary of Treasury and his delegates were authorized by Congress, pursuant to 26 U.S.C. §5146 (b) and 26 U.S.C. §7606, to enter the premises of retail dealers in liquors, the Supreme Court stated that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" (397 U.S. at 76). As a result, the Court held that the enactment by Congress of a statute penalizing a liquor licensee for refusing a warrantless admission of a federal agent did not offend the Fourth Amendment. The Court justified its holding on the ground that the liquor industry had long been subject to "close supervision and inspection" (397 U.S. at 77).

Following Colonnade, the Supreme Court held in

United States Biswell, supra, that a warrantless search and seizure of illegal firearms from a pawn shop owner by agents of the Secretary of the Treasury was not unreasonable under the Fourth Amendment. The Court's holding was predicated upon the Court's view that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection" (406 U.S. at 316).

Based upon the holdings in Colonnade and Biswell, a number of Courts have authorized a warrantless search of a businessman's premises upon the ground that the industry sought to be inspected is "pervasively regulated" by government. See, e.g., United States ex rel Terraciano v. Montanye, 493 F. 2d 682 (2d Cir. 1974); Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973); United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972); United States v. Business Builders, Inc., 354 F. Supp. 141 (N.D. Okla. 1973).

The underpinning of the Supreme Court's rationale in permitting warrantless searches, in certain limited circumstances, is its view that businessmen have to accept the burdens, as well as the benefits, when obtaining the authority from government to conduct that business. See,

e.g., United States v. Biswell, 406 U.S. at 316. But cf. Almeida - Sanchez v. United States, 413 U.S. 266 (1973); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). Significantly, Northwest has accepted the burden imposed by Congress in authorizing it to engage in the air carrier business, and it is clear that Northwest is "pervasively regulated" by the FAA. As demonstrated at length in Point I, supra, the FAA regulates each facet of Northwest's business, and it is therefore the FAA which, as a matter of course, is present on Northwest's premises to observe and enforce its regulations and requirements.*

Northwest is not unmindful that several Courts have opined that warrantless "spot check" inspections by OSHA officials are permissible. Brennan v. Buckeye Industries, 374 F. Supp. 1350 (S.D. Ga. 1974); Dunlop v. Able Contractor's, Inc., 4 BNA OSHC 1110 (D. Mont. 1976). However, it is submitted that these Courts have misconstrued those cases which have set forth the "pervasive regulation" doctrine.

The Act does not relate to any particular industry. "[The Act's] sweep is broad,"** and applies to all businesses that affect interstate commerce. 29 U.S.C. § 651(a)(3).

* 49 U.S.C. §§ 1425(b); 1429(a).

** Brennan v. Gibson's Products, Inc. of Plano, 407 F. Supp. 154 (E.D. Tex. 1976) (Three-Judge Court).

"As such, it applies to a wide variety of over 6,000,000 work places and does not focus on one particular type of business or industry." Barlow's, Inc. v. Marshall, 424 F. Supp. 437, 440 (D. Idaho 1976). Thus, the Act purports to

"embrace ... indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops - indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States."*

In short, the Act applies to all businesses, and Section 8(a) of the Act purports to authorize inspections on a uniform basis. By reason of the Act's broad application, therefore, it is clear that the limited exception to Camara and See does not obtain, for in Colonnade, Biswell and their progeny the statutory schemes sought to be enforced solely pertained to searches by the "pervasively regulating" agency.

Thus, in each of these recent cases, the warrantless inspection: (1) related directly to a statute, or regulatory scheme, adopted to pertain to a particular industry which required pervasive regulation; (2) the inspection was in connection with the specific purposes underlying the

* Brennan v. Gibson's Products, Inc. of Plano, 407 F. Supp. at 161.

pervasive regulation; and (3) the search was conducted by the agency, and agency official, empowered to regulate the industry sought to be inspected.*

These central factors should be clearly kept in mind since the suggestion that because an industry is pervasively regulated by one agency any other agency can dispense with the need for a warrant is not supported by the cases. Indeed, Congress has made it clear, pursuant to Section 4(b)(1), that only one Federal agency has the power to regulate the safe working conditions of personnel in a business, and it is that agency, and that agency alone, which has the authority to conduct an inspection. If these factual distinctions are overlooked, isolated language from these cases might be thought to suggest that general inspections by OSHA officials of Northwest's premises may be conducted without a warrant, for Northwest, as an airline, is certainly "pervasively regulated" by the FAA. Yet it is

* In United States ex rel Terraciano v. Montanye, the premises of a licensed pharmacist were subjected to a search by an investigator of the State Narcotic Control Bureau, pursuant to §§ 3350 and 3390 of the N.Y. Public Health Law; in Youghioghney inspectors sought to search coal mines pursuant to the Federal Coal Mine Health and Safety Act of 1969; in Del Campo Baking Mfg. Co. and Business Builders, Inc., agents of the Food and Drug Administration made inspections for adulterated commodities pursuant to the Food, Drug, and Cosmetic Act.

precisely because Northwest is "pervasively regulated" by the FAA that OSHA may not conduct searches with a warrant, let alone without a warrant.

As a result, Northwest submits that the analysis engaged in by the Courts in Dunlop v. Hertzler Enterprises, 418 F. Supp. 627 (D.N.M. 1976) and W.J. Usery v. Centrif-Air Machine Co., Inc., 424 F. Supp. 959 (N.D. Ga. 1977), is erroneous,* for a warrantless search by FAA officials may not be conducted with respect to a business which is "pervasively regulated" by another governmental agency which exercises statutory authority relating to "standards or regulations affecting occupational safety and health." To hold otherwise would place a highly regulated and licensed industry, such as the air carrier business, in the position of possibly having impliedly waived its Fourth Amendment right to be free from unreasonable searches and seizures by, among other agencies, OSHA, the Federal Trade Commission, the Securities and Exchange Commission, the Food and Drug Administration, and a host of other federal regulatory

* In Hertzler, the Court held that the employer "as a manufacturer of ammunition and paper boxes ... is not engaged in a pervasively regulated business and thus cannot be deemed to have impliedly consented to regulatory inspection." (418 F.Supp. at 632). In Centrif-Air Machine Co., Inc., the employer was engaged in the manufacture and sale of textile machinery which, the Court held, was not subject to pervasive state or federal regulation (424 F. Supp. at 962).

agencies, because of the fact that the industry is already regulated by FAA. The Fourth Amendment is incapable of such a construction. See W.J. Usery v. Centrif-Air Machine Co., Inc., 424 F. Supp. 959 (N.D. Ga. 1977); Brennan v. Gibson's Product's, Inc. of Plano, 407 F. Supp. 154 (E.D. Tex 1976); Barlow's, Inc. v. Marshall, 424 F. Supp. 437 (D. Idaho 1976); Empire Steel Manufacturing Company v. Marshall, 5 BNA OSHC 1819 (D. Mont. 1977).

Thus, the District Court erred when it held that a warrant need not be obtained by OSHA officials to search Northwest's premises, for the FAA regulates the safe working conditions of Northwest's employees, and it is that agency which may conduct warrantless searches of Northwest's premises. The purpose of permitting warrantless searches by the FAA, as set forth in the Colonnade and Biswell exception to the holding of Camara and See, is entirely consistent with the preemptive effect of Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1) (1970). By reason of the "pervasive regulation" of Northwest by the FAA, OSHA is preempted from regulating the safe working conditions of Northwest's employees, and the District Court erred by failing to resolve the jurisdictional issue embodied in Section 4(b)(1). See Points IV and V, infra.

POINT III

THE DISTRICT COURT IS NOT EMPOWERED
TO ISSUE A WARRANT

As set forth in Point II, supra, OSHA officials may not conduct a warrantless search of Northwest's premises. It is clear, however, that a search conducted pursuant to a warrant may only be engaged in if the Act empowers the Court to issue a warrant. However, Section 8(a) of the Act, 29 U.S.C. §657(a), does not prescribe a procedure for the issuance of a warrant by a "neutral and detached magistrate"*, and any attempt to interpret the statute to authorize the issuance of a warrant is an impermissible judicial "redraft-[ing] [f] an enactment of Congress". Barlow's Inc. v. Marshall, 424 F. Supp at 441; see also Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964); In Re Establishment Inspection of Northwest Airlines, Inc., 5 BNA OSHC 1848 (E.D. Wis. 1977). Northwest submits, therefore, that the District Court arrogated unto itself a legislative function when it ordered the magistrate to reinstate the search warrant.**

* Johnson v. United States, 333 U.S. 10, 14 (1948).

** While Northwest respectfully directed the attention of the Court below to the decision in Barlow's, Inc. v. Marshall, 424 F. Supp.437 (D. Idaho 1976), which was determined while the Secretary's application was sub judice, Northwest did not argue that the District Court lacked

Significantly, Section 8(a) of the Act* does not provide for a warrant procedure, and merely purports to authorize the Secretary and his designees to "enter without delay" and "to inspect and investigate" places of employment purportedly covered by the Act's provisions. Inasmuch as the statute does not specifically provide for a warrant procedure, no inference may be drawn of Congressional intent other than that the Act purports to authorize warrantless searches. As noted in Point II, supra, Congress has validly

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the authority to issue a warrant upon the Secretary's application. However, whether the District Court is empowered by the Act to issue a warrant is a question of subject-matter jurisdiction under 28 U.S.C. §§ 1337 and 1345, Brennan v. Buckeye Industries, 374 F. Supp. 1350 (S.D. Ga. 1974), and may be raised by the parties or the Court at any time. See, e.g., Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884).

* Section 8(a), 29 U.S.C. § 657(a), provides:

"In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -

"(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

drafted warrantless inspection statutes insofar as they relate to pervasively regulated industries. Such statutes include the Gun Control Act of 1968, 18 U.S.C. § 923(g); the Internal Revenue Code, 26 U.S.C. §§ 5146(b) and 7606; the New York Public Health Law, § 3385; the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 813; and the Food, Drug and Cosmetic Act, 21 U.S.C. § 74. However, since a warrantless search by OSHA officials is impermissible (See Point II, supra), the Act is constitutionally infirm and the District Court lacked subject-matter jurisdiction to issue a warrant. Barlow's, Inc. v. Marshall, 424 F. Supp. 437 (D. Idaho 1976); see also In Re Establishment Inspection of Northwest Airlines, Inc., 5 BNA OSHC 1848 (E.D. Wis. 1977).

Northwest is aware that a court presented with a constitutional challenge to a statute should "first ascertain whether a construction of the statute is fairly

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"(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

possible by which the question may be avoided." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Under the circumstances presented herein, there is no basis for such a construction.

First, it is clear that Congress could have specifically provided for a detailed warrant procedure within the Act if it had chosen to do so. See, e.g., the provisions set forth in the Federal Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C. § 880(d)(1).

Secondly, if the Court were to construct a warrant procedure in connection with Section 8(a) of the Act, it would have to formulate standards relating to the issuance of a warrant based upon probable cause which need be met by OSHA officials seeking to conduct an inspection. Among the various standards which necessarily should be formulated by the Court are: (1) the sufficiency of the grounds set forth in the application for a warrant to establish probable cause;* (2) the time within which the warrant must be executed subsequent to issuance;** and (3) the type of proceeding in which probable cause may be established.*** The Act, of course,

* See 21 U.S.C. §880(d)(1)

** See 21 U.S.C. §880(d)(3); Fed. R. Crim. P. 41 (c)(1)

*** The Secretary has sought to inspect Northwest's premises by different means. Compare the Secretary's filing of a summons and complaint with the District Court in an effort to obtain an inspection order in the case presently

does not provide guidance with respect to these factors, and in this regard, while the Court below held that previous citations of Northwest by OSHA provide a sufficient predicate for probable cause (A 131), it did not measure this standard against a standard which might have been articulated by Congress.

Finally, an attempted "construction" of the statute is to be avoided when protections guaranteed by the Bill of Rights must be measured against such a formulation. (Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964)). As the Court said in Aptheker v. Secretary of State, 378 U.S. at 516:

"...an attempt to 'construe' the statute and to probe its recesses for some case of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty."

(Cont'd)

pending before the Fifth Circuit, Marshall v. Northwest Airlines, Inc., Docket No. 77-1546, with his ex parte application before Magistrate Catoggio for an inspection warrant, and the "Application for Inspection Warrant Under the Occupational Safety and Health Administration Act of 1970" which he filed and served in the case of In Re Establishment Inspection of Northwest Airlines, Inc., 5 BNA OSHC 1848 (E.D. Wis. 1977).

Northwest's Fourth Amendment rights should not be left to subsequent conflicting interpretations by Courts in an attempt to gauge an unwritten standard of probable cause purportedly extant in Section 8(a) of the Act. That role should be left to Congress. Barlow's, Inc. v. Marshall, 424 F. Supp. 437, 441 (D. Idaho 1976).

POINT IV

IN FAILING TO EXAMINE THE AUTHORITY
OF OSHA OFFICIALS TO CONDUCT A SEARCH,
THE DISTRICT COURT DID NOT PROPERLY RE-
INSTATE THE WARRANT

If this Court is of the opinion that Section 8(a) of the Act may be interpreted to authorize the issuance of an inspection warrant based upon probable cause,* it is submitted that the Court below erred in reinstating the warrant relating to Hangar No. 1. In granting the Secretary's application, and requiring Northwest to exhaust its purported administrative remedies with respect to its contention that the FAA, and not OSHA, possesses the authority to conduct an inspection (A 128), the District Court failed to discharge those obligations required of a "neutral and detached magistrate"** who has been presented with an application for a warrant. In fact, the failure of the District Court to examine, pursuant to Section 4(b)(1) of the

* Various courts have held that, while a warrantless search by OSHA representatives, to which an objection has been made, would be impermissible, Section 8(a) may be interpreted to authorize the District Court or magistrate to issue a warrant based upon probable cause. See, e.g., Brennan v. Gibson's Products, Inc. of Plano, 407 F.Supp. 154 (E.D. Tex. 1976); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976); Marshall v. Chromalloy American Corporation, 5 BNA OSHC 1615 (E.D. Wis. 1977); Usery v. Centrif-Air Machine Co., Inc., 424 F. Supp. 959 (N.D. Ga. 1977); Empire Steel Manufacturing Company v. Marshall, 5 BNA OSHC 1819 (D. Mont. 1977).

** Johnson v. United States, 333 U.S. 10, 14 (1948).

Act,* the authority of OSHA to conduct a search of Northwest's premises, will result in a violation of Northwest's Fourth Amendment which cannot be remedied.

While the Secretary argued in the Court below that any question relating to the authority of OSHA to conduct a search must be resolved before the administrative forum, the proper issue before the Court is whether a magistrate may properly discharge his obligations if he issues a warrant without examining that authority. Whether the doctrine of exhaustion of administrative remedies must be applied in the instant case is unimportant, for if the Court or magistrate must examine the authority of the official seeking to conduct the search prior to issuing a warrant consistent with Fourth Amendment requirements, it necessarily follows that Northwest may, indeed, challenge the authority of OSHA to conduct a search of Northwest's premises before the District Court.

The obligation of the magistrate to examine the authority of the official seeking to conduct a search is unquestioned. That obligation should clearly not be avoided

* As noted above, Section 4(b)(1) provides that "[n]othing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

in a situation where, as here, a review of the facts presented to the magistrate and District Court reveals that the authority of OSHA to conduct a search is lacking. In Camara v. Municipal Court, the Supreme Court struck down a warrantless administrative search, and stated:

"Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. ... The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." (387 U.S. at 532) (emphasis supplied).

See also Almeida-Sanchez v. United States, 413 U.S. 266, 270-72 (1973); Electric Bond & S. Co. v. Securities and Exchange Commission, 303 U.S. 419 (1939); and United States v. Morton Salt Co., 338 U.S. 632, 652-653 (1949), where the Court stated that the inquiry of the administrative official must be "within the authority of the agency." In an analogous

situation in the case of Jones v. SEC, 298 U.S. 1,26 (1935), the Supreme Court stated:

"The citizen when interrogated about his affairs, has a right before answering to know why the inquiry is made, and if the purpose disclosed is not a legitimate one, he may not be compelled to answer."

The requirement that the magistrate must inquire into the authority of the agency, and agent, seeking to conduct the search before he may issue a warrant is an outgrowth of the obligations of a magistrate who has been requested to issue a warrant to a federal law enforcement official.

The basis for the issuance of such a warrant is Rule 41 of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 41(c) provides:

"A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant." (emphasis supplied).

Fed. R. Crim. P. 41 governs the procedure "in all criminal proceedings in the courts of the United States..."

(Fed. R. Crim. P. 1), and "is directed to federal offenses, i.e., that it authorizes search warrants for property believed to have been used or which is used as a means of committing a federal crime." Thomas v. United States, 376 F.2d 564, 566 (5th Cir. 1967). Significantly, in order to establish the necessary predicate for the issuance of a warrant to federal law enforcement officials by the magistrate, it is "necessary that the affidavit allege with at least some reasonableness that an offense against the laws of the United States had been committed." Thomas v. United States, 376 F.2d at 567. Thus, the agency seeking to conduct a search must possess the authority to regulate the conduct to which the inspection relates, and federal officials may not be issued search warrants relating to activities proscribed by state statutes. As the Fifth Circuit held in United States v. Brouillette, 478 F.2d 1171, 1176 (5th Cir. 1973), in reversing the convictions of the defendants in that no showing by the federal officials of the authority to search had been made to the magistrate:

"The warrant in question and the affidavit supporting it give no factual support sufficient to justify any belief that interstate commerce has been used for such a violation. In short, the magistrate... had absolutely no basis on which to place a finding that the instrumentalities of interstate commerce were being used contrary to federal law. Yet, that is what must be established in order to justify a warrant under these circumstances.

Otherwise, federal agents would be able, by merely mentioning a statute involving interstate commerce, to search what would otherwise be establishments violating only local state law..." (emphasis supplied).

See also Tripodi v. Morgenthau, 213 F. Supp. 735 (S.D.N.Y. 1962); United States v. Office No. 508 Ricou-Brewster Bldg., 119 F. Supp. 24 (W.D. La. 1954).

Not only must the magistrate examine the statutory authority of the agency seeking to conduct the search, but he must inquire into the authority of the agent seeking to make the inspection. Fed. R. Crim. P. 41(h); Fed. R. Crim. P. 54.

There is no difference here. The District Court, in failing to examine the fact that the FAA, and not OSHA, possesses the authority to conduct a search relating to the safe working conditions of Northwest's employees, improperly reinstated the inspection warrant, for without examining that authority the District Court could not have fulfilled its obligation to examine the "lawful limits of the inspector's power to search." Camara v. Municipal Court, 387 U.S. at 532. In fact, the District Court was presented upon the Secretary's application with a situation where a Congressional statute, Section 4(b)(1), specifically excludes OSHA from acting if another agency has exercised its authority to regulate the safe working conditions of employees, and a decision of the

Commission, per Judge Ditore, which the District Court was cognizant of, had specifically held that the FAA was exercising its authority to regulate the working conditions of Northwest's employees.

As a result, OSHA did not "establish" that it possessed the authority to regulate the safe working conditions of Northwest's employees. United States v. Brouillette, 478 F.2d at 1176. Magistrate Catoggio had properly discharged his function as a "neutral and detached" magistrate in noting that the FAA, and not OSHA, possessed the authority to conduct the search (A 58), and his vacatur of the warrant previously issued by him should not have been disturbed by the District Court.

POINT V

THERE IS NO REQUIREMENT THAT NORTHWEST MUST EXHAUST ITS PURPORTED ADMINISTRATIVE REMEDIES

Apart from the District Court's failure to discharge its obligation to examine the authority of OSHA officials to conduct a search, Northwest submits that there is no requirement that Northwest must exhaust its purported administrative remedies with respect to its contention that Section 4(b)(1) precludes OSHA from regulating the working conditions of Northwest's employees.

Initially, it must be noted that "[a]dministrative exhaustion is not a legal automaton but rather a legal conclusion compounded by balancing specific factors." Ecology Center v. Coleman, 515 F.2d 860, 871 (5th Cir. 1975); see also Diapulse Corp. of Am. v. Food and Drug Admin. of Dept. of H.E.W., 500 F.2d 75 (2d Cir. 1975).

Not surprisingly, therefore, the mechanical application of the exhaustion doctrine in cases pertaining to the authority of the Secretary to regulate the safe working conditions of various employees has explicitly been rejected in a number of cases. Barlow's Inc. v. Marshall, 424 F. Supp. 437 (D. Idaho 1976); Dravo Corp. v. Marshall, 77 Civ. 284 (W.D. Pa. April 5, 1977); Hayes-Albion Corp. v. Marshall, 77 Civ. 205 (N.D. Ohio Oct. 14, 1977)). Further, without specifically

enunciating that the doctrine had been rejected, other Courts have determined the Section 4(b)(1) issue on the merits. See, e.g., Dunlop v. Burlington Northern R.R., 395 F. Supp. 203 (D. Mont. 1975); Dunlop v. Avondale Shipyards, Inc., 3 BNA OSHC 1950 (E.D. La. 1976); Aluminum Company of America v. Morton, 3 BNA OSHC 1624 (D.D.C. 1975); Organized Migrants In Community Action, Inc. v. Brennan, 520 F.2d 1161 (D.C. Cir. 1975); cf. Marshall v. Great Lakes Dredge and Dock Company, No. Misc. 785-Civ. (S.D. Cal. July 11, 1977)).

The doctrine has no application to the instant situation, for Northwest submits that the Act does not apply in a situation where another agency, in this instance, the FAA, regulates the safe working conditions of employees, and an intrusion into its premises by OSHA representatives cannot thereafter be remedied. Secondly, if a remedy did exist, the constitutional question initially presented to the District Court precludes an application of the doctrine. Lastly, the doctrine has not been applied by the Courts in connection with jurisdictional conflicts between administrative agencies where the issue is primarily one of statutory interpretation.

(1)

The absence of an administrative remedy before the full Commission is apparent. First, it is quite possible that the OSHA officials who conduct an inspection of North-

west's premises will not cite Northwest for any violations of the Act. Thus, no administrative proceeding would be instituted, for proceedings ensue from the challenge by an employer of a citation. 29 U.S.C. §§ 659(a),(b) and § 666(d). Furthermore, even if a citation is issued, and Northwest successfully challenges, before the Commission, the authority of OSHA to regulate the safe working conditions of Northwest's employees, Northwest will be without a remedy, for the unconstitutional entry by OSHA officials into Northwest's premises will already have occurred. No remedy can, of course, be fashioned by the Commission to reinstate Northwest to its position prior to the unconstitutional intrusion.

The Courts have repeatedly held that a litigant may not be compelled to exhaust its administrative remedies if they prove non-existent, or it is futile to follow them.* NLRB v. Shipbuilding Local 22, 391 U.S. 418, 426, n.8 (1968); Johnson v. Seaboard Air Line Railroad Company, 405 F.2d 645, 652 (4th Cir. 1968). The Fourth Circuit most recently rejected the doctrine of exhaustion of administrative remedies in a case where the parties litigated, before the

* As noted above, the full Commission has granted the Secretary's motion, over the opposition of Northwest, to defer a determination of the appeal in Usery v. Northwest Airlines, Inc., Docket No. 13649, pending the appointment of a third Commissioner, and to date no determination has been rendered by the Commission, despite the fact that Judge Ditore's decision was rendered on September 28, 1976. In this regard, see Brennan v. Occupational Safety & Health Review Com'n., 492 F.2d 1027, 1032, n.6 (2d Cir. 1974).

District Court, the issue whether certain employers were obligated to comply with the health and safety standards of the Federal Coal Mine Health and Safety Act of 1969. In holding that the District Court was empowered to adjudicate the issue of that act's coverage, the Court held that "any attempt to follow administrative remedies would be futile, and consequently need not be exhausted." Bituminous Coal Operators' Association v. Secretary of Interior, 547 F.2d 240, 244 (Cir. 1977); see also Jewel Companies, Inc. v. FTC, 432 F.2d 1155 (7th Cir. 1970); Mandel v. U.S. Dept. of Health, Ed. and Welfare, 411 F.Supp. 542 (D. Md. 1976).

(2)

The mere presentation of a compelling Fourth Amendment issue to the District Court precludes a requirement that administrative remedies be exhausted. Wolff v. Selective Service Bd., 372 F. 2d 817 (2d Cir. 1967); Fay v. Douds, 172 F.2d 720 (2d Cir. 1949); Diapulse Corp. of Am. v. Food and Drug Admin. of Dept. of H.E.W., 500 F.2d 75, 78 (2d Cir. 1974) (mere legal question presented to the Court); Barlow's, Inc. v. Marshall, 424 F. Supp. 437 (D. Idaho 1976); Dravo Corporation v. Marshall, 77 Civ. 284 (W.D. Pa. April 5, 1977); Hayes-Albion Corporation v. Marshall, 77 Civ. 205 (N.D. Ohio October 11, 1977).

In the instant case, the investigation by OSHA officials of Northwest's premises is a necessary predicate to

the institution of the administrative process. This Court has not allowed an administrative body to determine claims of litigants where the investigation itself may lead to violations of the Constitution. As the Court said in Wolff v. Selective Service Bd., 372 F.2d 817, 825 (2d Cir. 1967):

"Normally it is desirable not only that the administration function with a minimum of judicial interference but also that, when the administration does err, it be free to work out its own problems. But, as noted above, there are competing policies and when as here a serious threat to the exercise of First Amendment rights exists, the policy favoring the preservation of these rights must prevail."

See also Public Util. Commission v. United States, 355 U.S. 534, 540 (1958), where the Supreme Court stated:

"Where the only question is whether it is constitutional to fasten the administrative procedure onto a litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."

See also McKart v. United States, 395 U.S. 185 (1969); Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973); City of Philadelphia, v. SEC, 434 F.Supp. 281 (E.D.Pa. 1977). No less deference should be accorded to rights protected by the Fourth Amendment.

(3)

The Supreme Court has held that there is no requirement to exhaust administrative remedies in connection with the resolution of jurisdictional disputes between administrative agencies. Order of Railway Conductors v. Swan, 329

U.S. 520 (1947); Public Utilities Comm. v. United Fuel Gas Co., 317 U.S. 456 (1943). In Order of Railway Conductors v. Swan, the Supreme Court affirmed the determination of the Court of Appeals for the Seventh Circuit which had held that one division of the National Railroad Adjustment Board, rather than another division of that administrative body, had jurisdiction over disputes involving certain railroad employees. In arriving at its determination, the Court of Appeals had affirmed an order of the District Court, after hearing, which adjudicated the dispute between the competing divisions. In upholding the propriety of the District Court's adjudication, the Supreme Court specifically noted that the "issue is primarily one of statutory interpretation."* Thus, the Supreme Court implicitly acknowledged that its determination did not require a specialized administrative understanding with respect to the issue of jurisdiction (329 U.S. at 525). The Supreme Court rejected the contention that judicial intervention was inappropriate, stating:

"At the outstart it is important to note that judicial review of this matter is not precluded. *** We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level,

* See Diapulse Corp. of Am. v. Food and Drug Admin. of Dept. of H.E.W., 500 F.2d 75, 78 (2d Cir. 1974).

making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. . . . A declaratory judgment action is therefore appropriate to remove such an administrative stagnation." (329 U.S. at pp. 524-525).

Similarly, the issues presented here do not require a specialized administrative understanding.

In Public Utilities Comm. v. United Fuel Gas Co., 317 U.S. 456 (1943), the United Fuel Gas Company ("United"), a West Virginia corporation, sought to enjoin the enforcement of a Public Utilities Commission of Ohio order requiring United to present evidence relating to a reasonable rate to be charged for the sale of natural gas to a company located in Ohio. The basis of United's claim was that the Commission's order was an unconstitutional attempt to regulate interstate commerce. The District Court enjoined the Commission on the basis of the preemptive effect of the Natural Gas Act, which empowered the Federal Power Commission to regulate the transportation and sale of natural gas in interstate commerce. The Supreme Court stated, in affirming the order of the District Court, that the order (and a related order) were "invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission." (317 U.S. at 468).

The application of Section 4(b)(1) does not involve any special expertise of the Commission; it is purely a

legal question which should have been addressed, and resolved, by the District Court. Organized Migrants In Community Action, Inc. v. Brennan, 520 F.2d 1161 (D.C. Cir. 1975); Dunlop v. Burlington Northern R.R., 395 F.Supp. 203 (D. Mont. 1975); Aluminum Company of America v. Morton, 3 BNA OSHC 1624 (D.D.C. 1975); Dunlop v. Avondale Shipyards, Inc., 3 BNA OSHC 1950 (E.D. La. 1976); cf. Marshall v. Great Lakes Dredge and Dock Company, No. Misc. 785 - Civ. (S.D. Cal. July 11, 1977).

In holding that Northwest must exhaust its purported administrative remedies, the District Court cited Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), Matter of Restland Memorial Park, 540 F.2d 626 (3d Cir. 1976), and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (A 128, 129). It is submitted, however, that those cases do not stand for the proposition that Northwest must suffer an unremediable invasion of its constitutional rights.

In Myers, the District Court was requested to enjoin a hearing to be held before the National Labor Relations Board upon an unfair labor practice complaint issued by the Board. The employer sought the injunction upon the ground that it was not engaged in commerce within the meaning of the National Labor Relations Act. In holding that the resolution of the question of that act's coverage necessarily

must initially reside within the Board's jurisdiction, the Supreme Court held that the District Court could not enjoin the hearing.

Several crucial distinctions between Myers and the instant matter render Myers inapposite. First, there was a pending administrative proceeding which could entertain the defense of lack of jurisdiction by the Board over the employer. The Supreme Court specifically held:

"It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed." (303 U.S. at 49).

On the other hand, no OSHA administrative proceeding presently exists which might afford Northwest an opportunity to present its claim prior to the suffering of an intrusion by OSHA officials into its premises.

Moreover, in enacting the National Labor Relations Act Congress evinced an intent respecting coverage different from that intent expressed in Section 4(b)(1) of the Act. The provisions of the National Labor Relations Act only apply in those instances where the labor relations and rights of the parties "affect interstate commerce".* In

* Section 2(7) of the National Labor Relations Act, 29 U.S.C. §152(7), defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

determining whether or not an employer or category of industry is within "interstate commerce", as defined by the National Labor Relations Act, the National Labor Relations Board has been empowered to establish discretionary standards relating to the Board's assertion of jurisdiction. 29 U.S.C. §164(c)(1). Thus, that act either applies, or does not apply, upon the basis of a determination which Congress has entrusted to the National Labor Relations Board.

However, Section 4(b)(1) of the Act evinces a different Congressional intent, for that section precludes OSHA from acting if another Federal agency exercises statutory authority to regulate the safe working conditions of a businessman's employees, and it does this by stating:

"Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

Under the circumstances specified in the statute Congress has stated that nothing in the Act shall have application. It is therefore clear that Congress did not contemplate that in those circumstances a determination respecting coverage should result from a final administrative determination made by OSHA. On the contrary, what Congress did was to formulate a legal issue appropriate for determination by a Court in any contested case. The structure of the statute clearly

formulates a legal issue suitable for determination by a Court. This is particularly appropriate where the issue to be determined is which of two agencies has jurisdiction.*

Lastly, in Myers the Supreme Court held that the mere holding of a hearing before the Board, at which the employer could present its claim, did not violate the constitutional rights of the employer, and did not necessitate the intervention of the District Court. (303 U.S. at 51, 52). Here, however, the intrusion by OSHA officials will result in a violation of Northwest's rights which cannot be remedied.

In the case of Oklahoma Press Pub. Co. v. Walling, 327 U.S. 185 (1946), which was cited by the Court below (A 128), the Supreme Court held that the District Court was without power to refuse to order compliance with administrative subpoenas upon the ground that the administrative agency was

* As in Myers, the issue before the Court in Matter of Restland Memorial Park, 540 F.2d 626 (3d Cir. 1976) was merely whether an employer's business affected "commerce." As a result, the holding in Restland may be distinguished, for the Third Circuit was not confronted by the litigants with the preemptive effect of Section 4(b)(1), or the Fourth Amendment issue, which, as noted above, are issues that necessarily must be resolved by the District Court. However, if the Court is of the opinion that the Restland decision purports to condone a determination of OSHA's jurisdiction after a physical intrusion has taken place, Northwest submits that the decision is erroneous, and should not be followed by this Court.

not authorized to regulate the activities of the employer. The Supreme Court emphasized, however, that "the records in these [sic] cases present no question of actual search and seizure" (327 U.S. at 195), and that under the circumstances of an invasion by actual search and seizure", the abuses "from which protection may rightfully be claimed" are different (327 U.S. at 213). Similarly, in the oft-cited case of Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), there was no question of an actual invasion by the administrative officials. As noted in Point IV, supra, search warrants may only be obtained ex parte upon a determination by a magistrate that the agency seeking to conduct an inspection possesses the authority to do so.

The District Court erred in failing to apply Section 4(b)(1). Northwest was not required to exhaust its administrative remedies.

CONCLUSION

The orders of the District Court dated June 10, 1977 and July 5, 1977 should be reversed, with directions to the District Court to dismiss the complaint.

Dated: New York, New York
December 1, 1977

Respectfully submitted,

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